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JUSTICE GINSBURG'S INTERNATIONAL PERSPECTIVE

Susan H. Farbstein¹

Assistant Clinical Professor and Clinical Director

Human Rights Program, Harvard Law School

The value of looking to international and comparative law, in particular on questions related to equality, is one important theme that emerges from Justice Ruth Bader Ginsburg's twenty years on the Supreme Court. This perspective dates to her career as a practicing attorney. The first matter she briefed to the Court, in 1971, included citations to two cases from the then-West German Constitutional Court.² Justice Ginsburg has said that she did not expect the Court would cite these cases in its opinion, but rather hoped that they might have "a positive psychological effect. If our Supreme Court noticed what the West German Constitutional Court was doing, the Justices might ponder: 'How far behind can we be?'"³ Since that time, she has helped shape our—and the Court's—evolving notion of the place of international and foreign law in U.S. jurisprudence. Her years on the Court have been marked by its growing attentiveness to legal developments around the world, as well as a recognition that the United States should keep pace with these changes.

While always cognizant of the fact that only U.S. law provides a binding precedent for the Court, Justice Ginsburg has provided a crucial voice for looking beyond our borders "to add to the store of knowledge relevant to the solution of trying questions."⁴ No decision of hers better embodies this approach than her concurring opinion in *Grutter v. Bollinger*.⁵ After being denied admission to the University of Michigan Law School, Barbara Grutter, a white woman, alleged that she had been discriminated against on the basis of her race and sued to challenge the validity of the school's affirmative action admissions program. The Court found

that the admissions process did not violate the Fourteenth Amendment's equal protection guarantee, and that diversity was a sufficiently compelling interest to permit the consideration of race as practiced by the law school's admissions program.

In her concurring opinion in *Grutter*, Justice Ginsburg relied upon international human rights law to support her conclusions, and in particular on two United Nations Conventions. Citing the International Convention on the Elimination of All Forms of Racial Discrimination,⁶ she noted that "the Court's observation that race-conscious programs 'must have a logical end point,' accords with the international understanding . . . of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994 . . . instructs [that affirmative action measures] 'shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.'"⁷ Relying further on the Convention on the Elimination of All Forms of Discrimination Against Women,⁸ she noted that affirmative action programs are permissible but must be temporary measures limited to the length of time required to achieve *de facto* equality.⁹ In addition, her dissenting opinion in the companion case of *Gratz v. Bollinger*¹⁰ referenced her use of international law in *Grutter*. Differentiating between invidious and remedial discrimination, she stated that "contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate *de facto* equality."¹¹

Justice Ginsburg had been thinking about affirmative action through an international human rights lens long before these cases reached the Court. In a 1999 speech, she noted that affirmative action, both in the United States and abroad, is anchored in the Universal Declaration of Human Rights—and appropriately so, given that both affirmative action and the Declaration itself stand at the intersection of the civil/political and economic/social rights regimes.¹² She described how affirmative action programs aim to redress historic and continuing denials of the right

to equality, as well as to advance the economic and social well-being of groups disproportionately impacted by poverty, lack of quality education and health care, or unemployment. Reading the Declaration in conjunction with the two associated Conventions that she would later cite in *Grutter*, she stated that the documents “indicate[] that affirmative action is not necessarily at odds with human rights principles, but may draw force from them, in particular, from the prescriptions on equality coupled with provisions on economic and social well-being.”¹³ Indeed, the Declaration’s social welfare theme aligns with the idea that a diverse student body could enrich the educational experience of all students. Article 26 states that public education “shall be directed” to “promoting understanding, tolerance, and friendship among all nations, racial or religious groups.”¹⁴ As Justice Ginsburg has elsewhere explained, “[A]ffirmative action so directed might break down more barriers than it raises by enabling members of diverse groups to share in the everyday business of living, working, and learning together.”¹⁵

Both before and after *Grutter*, Justice Ginsburg’s public lectures have championed the practice of looking beyond our borders for guidance: “The U.S. judicial system will be the poorer, I have urged, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own.”¹⁶ She respects international instruments and the legal judgment of those outside our country, noting that, “Judges in the United States are free to consult all manner of commentary—Restatements, Treatises, what law professors or even law students write copiously in law reviews . . . why not the analysis of a question similar to one we confront contained in an opinion of the Supreme Court of Canada, the Constitutional Court of South Africa, the German Constitutional Court, or the European Court of Human Rights?”¹⁷

American attorneys working on human rights issues, whether in the United States or abroad, find her willingness to consider the practices and logic of the international community especially valuable. As Justice Ginsburg herself has noted, this approach aligns with our history.¹⁸ The Framers of our Constitution understood that the country would

be bound by international law and granted Congress the authority “to define and punish . . . Offences against the Law of Nations.”¹⁹ Our first Chief Justice, John Jay, wrote that “by taking a place among the nations of the earth, [the United States had] become amenable to the laws of nations.”²⁰ In *The Paquete Habana*, the Supreme Court famously explained that “international law is part of our law.”²¹

Just as importantly, however, this approach signals our humility, reinforces the value of consultation and comparative dialogue, and recognizes that we have much to learn from others’ innovations as we continue to work together against common injustices. As Justice Ginsburg has so eloquently stated: “[C]omparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.”²²



ENDNOTES

- 1 The author would like to thank Caroline Schneider, Harvard Law School '13, for her research assistance in preparing this piece.
- 2 *Reed v. Reed*, 404 U.S. 71 (1971). The case involved an Idaho statute about who could administer a decedent’s estate, which read: “As between persons equally entitled to administer a decedent’s estate, males must be preferred to females.” Attorney Ginsburg cited two cases in which the West German Court held similar laws unconstitutional. The first involved a provision of the German civil code providing that when parents disagree about the education of a child, the father decides. The other involved a form of land ownership and provided that when an owner dies, the property is inherited in whole by the eldest son.

- 3 “A Conversation with Justice Ruth Bader Ginsburg,” 53 Kan. L. Rev. 957, 960-61 (2005).
- 4 Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Speech at the International Academy of Comparative Law, American University: “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication (July 30, 2010) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp_o8-02-10.html) [hereinafter Speech at the International Academy of Comparative Law].
- 5 539 U.S. 306 (2003).
- 6 G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14), U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969.
- 7 *Grutter*, 539 U.S. at 344.
- 8 G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46), U.N. Doc. A/34/46, entered into force Sept. 3, 1981.
- 9 *Grutter*, 539 U.S. at 344.
- 10 539 U.S. 244 (2003).
- 11 *Id.* at 302.
- 12 Ruth Bader Ginsburg and Deborah Jones Merritt, Fifty-First Cardozo Memorial Lecture Delivered at the House of the Association of the Bar of the City of New York: “Affirmative Action: An International Human Rights Doctrine” (February 11, 1999) (transcript available at 21 CARDOZO L. REV. 253 (1999)) [hereinafter Fifty-First Cardozo Memorial Lecture].
- 13 *Id.*
- 14 G.A. res. 217A, U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/810 (1948), art. 26(2).
- 15 Fifty-First Cardozo Memorial Lecture.
- 16 Speech at the International Academy of Comparative Law.
- 17 Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Speech at the Constitutional Court of South Africa: “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication (Feb. 7, 2006) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp_o2-07b-06.html).

- 18 See Fifty-First Cardozo Memorial Lecture.
- 19 U.S. Const. art. I, § 8, cl. 10.
- 20 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).
- 21 175 U.S. 677, 700 (1900).
- 22 Fifty-First Cardozo Memorial Lecture.